Supreme Court, U.S.
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No. 90-35

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

HILARY FORETICH,
Petitioner,

v.

LIFETIME CABLE and BRITISH BROADCASTING CORP.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a trial court's temporary restraining order, barring the telecast of portions of a news documentary of conceded public interest, was properly vacated by an appellate court because the moving party made no showing to justify the injunctive remedy it sought.*

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* Pursuant to Supreme Court Rule 29.1, Respondent British Broadcasting Corp. states that it has no parent company and holds shares of the following companies: Listener Publications, Ltd.; House of Commons Broadcasting Unit, Ltd.; Broadcasters Audience Research Board, Ltd.; Secuir S.A. (Belgium); Visnews, Ltd.; and Multi Media Corporation, Ltd. Respondent Lifetime Cable is not a legal entity. The Lifetime Television network is owned and operated by Hearst/ABC-Viacom Entertainment Services, a joint venture, acting as a partnership.

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BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISION INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 24.2, respondents respectfully supplement petitioner's *Statement of the Case* as follows:

1. The television documentary at issue (the "Documentary"), as petitioner correctly notes, examines the

"internationally publicized" dispute between Drs. Elizabeth Morgan and Eric Foretich concerning their daughter Hilary, "a subject of substantial public interest." Petition for a Writ of Certiorari ("Petition"), at 1-2, 6. That dispute raises significant public policy issues regarding the ability of the American legal system to deal effectively with charges of child sexual abuse. Dr. Morgan's highly publicized views with respect to those very issues led her to violate court orders and place her daughter in hiding rather than permit Hilary to attend unsupervised visits with her father. Indeed, the extraordinary public interest regarding this matter is illustrated by, among other things, the special legislation enacted by Congress to release Dr. Morgan from her incarceration for failure to obey the court's orders. *See* Pub. L. No. 101-97 (1989).

2. At the center of this controversy are allegations that Dr. Foretich sexually abused Hilary and, specifically, the issue of whether those charges are accurate or are the result of Hilary's being "coached" by Dr. Morgan. *See* Appendix to Brief in Opposition ("R. App.") 6a ¶ 9 (Declaration of Stephen Lambert, admitted in evidence in trial court). Equally central to the controversy are various rulings of the District of Columbia Superior Court including, *inter alia*, its decision to permit unsupervised visits between Hilary and her father when that Court had concluded that the evidence with regard to whether he abused her was "in equipoise," *Morgan v. Foretich*, 546 A.2d 407, 410 (D.C. 1988), its order incarcerating Dr. Morgan for placing Hilary in hiding, and its refusal to entertain videotaped evidence of Hilary describing her father's abuse, *see Morgan v. Foretich*, 528 A.2d 425, 428 & n.6 (D.C. 1987). The Documentary focuses upon the Superior Court's adjudication of these issues, which are part and parcel of the larger debate concerning the legal system's competency in dealing with conflicting claims of child abuse. *See Morgan v. Foretich*, 846 F.2d 941, 943 (4th Cir. 1988) ("Courts and legisla-

tures alike have struggled with this deeply troubling problem.").[1]

3. The undisputed evidence reveals that the videotaped conversation between Hilary and her mother, which petitioner seeks to enjoin, was neither "surreptitiously" nor "covertly" filmed, as petitioner repeatedly contends. *See, e.g.*, Petition, at (i), 2, 3. Dr. Mary Froning, the child's treating psychologist, testified quite clearly and without contradiction in the trial court that Hilary knew she was being videotaped and that she knew that others, specifically Drs. Froning and Corwin, "would see the tape. We made that clear to her." Appendix to Petition for a Writ of Certiorari ("App.") 44a. Accordingly, petitioner's self-described "sole" rationale for seeking review in this Court—*i.e.*, "preventing the broadcast on television of the *surreptitiously* taped private conversation [Hilary] had with her mother," Petition, at 2 (emphasis added)—simply has no basis in fact.

4. Petitioner correctly notes that Dr. Froning did not consult with Linda Holman, Esq., appointed by the District of Columbia Superior Court as a guardian *ad litem* for Hilary, before consenting to Dr. Morgan's providing the videotapes to respondents. Petition, at 6. Dr. Froning's undisputed testimony, corroborated by Dr. Foretich's counsel in open court, however, is that Ms. Holman's appointment is limited to supervising and reporting to the Superior Court about Dr. Foretich's court-ordered

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[1] In one lawsuit instituted by Dr. Morgan and Hilary against Dr. Foretich, the Fourth Circuit, including Justice Powell sitting by designation, held that a child's own statements often are the best evidence of sexual abuse. *See Morgan v. Foretich*, 846 F.2d at 943-50. Indeed, the court noted, "[o]ften, the child is the only witness." *Id.* at 943. Thus, the videotape at issue speaks not only to the truth of the sexual abuse claims against Dr. Foretich, but also to Dr. Foretich's allegation that Hilary was coached by her mother to make the claims.

visits with Hilary. *See* App. 52a (Dr. Froning); App. 8a (Dr. Foretich's counsel).[2]

5. The tape recording at issue was provided to respondents by Dr. Morgan, with the consent of Dr. Froning, Hilary's treating psychologist. App. 40a.[3] The original recording presumably remains in Dr. Morgan's possession. Since respondents are the only defendants named in this lawsuit, no other party would be bound by the injunctive relief petitioner seeks. Moreover, virtually identical recitations of Hilary's own descriptions of her father's alleged abuse, as well as portions of the challenged videotape itself, had been disseminated widely by the media months before petitioner and Dr. Foretich instituted these proceedings.[4]

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[2] Ms. Holman, who did not appear or testify in the trial court and who is a lawyer, not a clinician, has not seen Hilary Foretich since 1987. The statements attributed to her in Dr. Foretich's complaint—*i.e.*, that the "tape is being broadcast in violation of Hilary's doctor-patient privilege," App. 62a—are particularly inapposite since the videotape depicts Hilary talking with her mother, *not* her doctor, and her mother, Hilary's custodial parent and the other party to the conversation, provided the tape to respondents.

[3] Petitioner incorrectly states that the tape was provided to respondents by Dr. Froning. *See* Petition, at 5; *see also* R. App. 5a-6a ¶¶ 4, 6 (Declaration of Stephen Lambert).

[4] *See, e.g.*, Fremon, *The Real Elizabeth Morgan Story: What the Jury Was Never Told, What the Judge Refused to Hear*, MOXIE, Feb. 1990, at 22 (" 'I see my daddy's hiney,' said Hilary, 'and I go like this . . .' and she made licking motions with her mouth and tongue."); *id.* at 117 ("Hilary said, 'Daddy spanked me with his fucker' and pointed to her own vaginal area and doll's to show where."); *id.* ("Hilary made clearer what her daddy did. She had the doll representing Hilary lying in bed both face down and face up with the daddy doll on top of her. She said he 'poked his fucker in my hiney.' When asked where, she put her finger in the anus of the Hilary doll and then said he put it in 'the other hole, too' and put her finger in the vagina of the doll. Then she showed with the daddy doll how the penis entered the anus and the vagina."); Trebilcock, *Hiding Hilary*, GLAMOUR, Nov. 1989, at 300 (" 'I see my daddy's heinie and go lick lick' "); *id.* (Hilary puts "daddy doll's

6. There is absolutely no evidence in this record supporting petitioner's claim that "respondents' commercial arrangements with television stations apparently controlled the timing of the broadcast." Petition, at 6. In fact, the scheduled telecasts, all of which have now been completed, followed shortly after the public revelation that Hilary Foretich is now living in New Zealand, the commencement of legal proceedings there, and the relocation of Dr. Morgan, after the return of her passport by the Superior Court, to New Zealand.[5]

7. Dr. Froning did not testify, on cross-examination or otherwise, that "it is ordinarily harmful to a child to broadcast publicly the child's account of sexual abuse." Petition, at 7. To the contrary, Dr. Froning, a licensed psychologist with a doctorate in clinical psychology, *see* App. 37a, testified that, when a child has been abused, it is important that the child understand that there is "really no shame for them to become public." App. 45a.[6]

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penis to her mouth" and says " 'Daddy's heinie' "). In contrast to the foregoing, the Documentary contains far less extensive and less graphic references to Hilary's accounts of her abuse. *See* Petition, at 4 n.3. *See also* R. App. 7a ¶ 4 (Declaration of Lee Levine, admitted in evidence in trial court, referencing January 1990 CBS television broadcast including other portions of videotape at issue).

[5] In any event, petitioner's suggestion, that an asserted lack of "urgency" supporting telecast "on the particular dates in April" chosen by respondents justifies "temporary" injunctive relief, is demonstrably in error. Petition, at 6. This Court has long recognized that the burden imposed on those seeking to enjoin expression is in no sense "reduced by the temporary nature of a restraint." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *see Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

[6] *See* App. 45a-46a (testimony of Dr. Froning) ("That's because of the context that incest occurs, which is that it is secret and that it is done without anyone else present. They have—children have a feeling of shame about it. . . . I don't believe that we, as a society, should add to that shame.").

Moreover, Dr. Froning expressly disputed petitioner's suggestion that this is, by any stretch of the imagination, an "ordinary" case. App. 56a. Indeed, based on her 87 therapy sessions with Hilary, *see* App. 38a, Dr. Froning testified that "victims of child sexual abuse need to be reassured that they have experienced nothing shameful because of what has happened to them. I believe that the airing of 'Hilary in Hiding' would provide such reassurance to Hilary," R. App. 2a ¶ 10.

8. Neither petitioner nor Dr. Foretich offered any evidence—not a single witness, declaration or exhibit—in support of their application for injunctive relief. The Court of Appeals based its ruling vacating the temporary restraining order on the papers submitted by the parties, including the undisputed declarations submitted by respondents and admitted into evidence, the complaint and application for a temporary restraining order, and the Documentary itself. It heard no oral argument from counsel.

REASONS FOR DENYING THE WRIT

Petitioner's submission is premised on two assertions: "Not every order affecting future expression is presumptively unconstitutional" and "[j]udicial preservation of an individual's right to privacy may justify a court order barring a television broadcast." Petition, at 9, 10. As general principles of law, respondents have no present occasion to debate either of these observations. Neither proposition, however, supports petitioner's request for review in this Court because (1) they are in no manner inconsistent with the Court of Appeals decision at issue and (2) their application in this case does not render legally permissible the trial court's order (the "Order") vacated by the Court of Appeals.

I. PETITIONER DID NOT CARRY ITS BURDEN OF JUSTIFYING INJUNCTIVE RELIEF.

Petitioner's first proposition—that "not every order affecting future expression is presumptively unconstitutional"—may be accepted for present purposes. Presumably, expression that is not protected by the First Amendment enjoys no immunity from previous restraint beyond that imposed by generally applicable doctrines of equitable relief. *See, e.g., Near v. Minnesota*, 283 U.S. 697, 707-08 (1930) (suggesting that injunction prohibiting obscenity is not presumptively unconstitutional); *Freedman v. Maryland*, 380 U.S. 51, 54 (1965) (same). Neither respondents nor the Court of Appeals has purported to suggest otherwise.[7]

The Court of Appeals concluded, quite unremarkably, that this petitioner had not made the requisite showing to justify the injunctive remedy it sought.[8] First, peti-

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[7] The Court of Appeals' one-paragraph order simply notes that the trial court's Order—concededly an injunction prohibiting future expression—is presumptively invalid and that petitioner's claims must "be redressed in legal actions that do not require a prior restraint in derogation of the First Amendment." App. 1a. Fairly read, especially given the expedited circumstances under which it was rendered, the Court of Appeals' unpublished order does not purport to declare a broad rule that injunctive relief is never permissible to redress privacy rights, but rather that *this* petitioner had not met its burden in *this* case of demonstrating either that it had stated a valid cause of action or that the expression at issue is unprotected by the First Amendment. *See* pp. 8-11 *infra*; *California v. Rooney*, 483 U.S. 307, 311 (1987) ("This Court 'reviews judgments, not statements in opinions.'") (citations omitted).

[8] The First Amendment notwithstanding, all applicants for temporary injunctive relief in the District of Columbia Circuit, including petitioner, are required to carry the considerable burden of demonstrating "that they have a substantial likelihood of success on the merits, that without such relief they will suffer irreparable harm, that the issuance of the injunction will not substantially harm other interested parties, and that the granting of such relief is in the public interest, or at least is not contrary to that interest." *Federal Food Serv., Inc. v. Marshall*, 481 F. Supp. 816, 818 (D.D.C. 1979) (citing *Washington Metropolitan Area Transit Comm'n v.*

tioner did not make any showing that the expression at issue is unprotected by the First Amendment, and the trial court purported to make no such determination. Not only did the trial judge decline to view more than three minutes of the forty-minute program, *see* App. 12a, he expressly stated that "the concern I have is really not with the first amendment. The concern I have is with this young child," App. 28a. The Order contains no findings that the expression at issue, which concededly addresses "a subject of substantial public interest," Petition, at 6; *see Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2611 (1989), is unprotected by the First Amendment and recites no facts that would support such a conclusion in any event, *see* App. 3a-4a.

Second, although petitioner contended in the trial court that its claim sounded in the tort of invasion of privacy, *see* App. 22a, the lawyer who instituted the proceedings in Hilary Foretich's name disagreed, *see* App. 33a, and the trial judge expressly disclaimed reliance on the privacy tort in enjoining the telecast, *see* App. 31a. Indeed, the trial judge acknowledged that, although he "believe[d] there is a cause of action," he did not know "how the parties are going to be able to articulate it," App. 31a. Thus, the trial court's restraining order was premised on no identifiable legal right asserted by petitioner, whether flowing from the Constitution, *see Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976) (prior restraint request based on Sixth Amendment), statute, *see Near v. Minnesota*, 283 U.S. 697 (1930) (prior restraint sought pursuant to statutory nuisance regulation), the law of contract, *see Commonwealth v. Wiseman*, 356 Mass. 251, 259, 249 N.E.2d 610, 615 (1969), *cert. denied*, 398 U.S. 960 (1970) (prior re-

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Holiday Tours, Inc., 559 F.2d 841, 842 (D.C. Cir. 1977)). As the following discussion demonstrates, petitioner made no such showing.

straint permissible where defendant violates agreement), or common law tort.[9]

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[9] The trial court's reluctance to premise injunctive relief on the invasion of privacy tort is understandable since petitioner, even if it had endeavored to do so, could not demonstrate "a substantial likelihood for success on the merits" of that claim. *Federal Food Serv., Inc. v. Marshall*, 481 F. Supp. at 818. Although this is not the forum to debate in detail the merits of petitioner's invasion of privacy claim, suffice it to say that it faces a number of imposing hurdles, none of which petitioner even attempted to clear in the trial court: (1) Virginia, where Dr. Foretich resides, does not even recognize the tort, *see Foretich v. Glamour*, No. 89-3099, slip op. at 6 (D.D.C. Apr. 3, 1990) (Gesell, J.) (dismissing another invasion of privacy claim sought to be instituted by Dr. Foretich on his and Hilary's behalf); (2) the District of Columbia, where Hilary last resided in the United States, precludes invasion of privacy claims unless "the public has no legitimate concern" in the subject matter of the allegedly invasive publication, *Wolf v. Regardie*, 553 A.2d 1213, 1220 (D.C. 1989); *see* Petition, at 1-2, 6 (petitioner concedes existence of public controversy surrounding legal dispute concerning Hilary Foretich); (3) since the tapes at issue were provided to respondents by Dr. Morgan, Hilary's custodial parent, with the consent of her treating psychologist, such "[c]lear evidence of consent will insulate a party from liability" for invasion of privacy, *Vassiliades v. Garfinkel's*, 492 A.2d 580, 590 (D.C. 1985); and (4) since there is no privacy right under District of Columbia law attaching to "matters already publicly released" in the news media, *Wolf v. Regardie*, 553 A.2d at 1219, the literally thousands of articles and broadcasts in this country and abroad discussing the allegations of sexual abuse against Hilary, displaying her image by photograph and film, and repeating Hilary's own statements regarding the nature of the alleged sexual abuse, would appear to preclude petitioner's cause of action as a matter of law. *See* RESTATEMENT (SECOND) OF TORTS § 652D, comment b (1977) ("[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public").

In this regard, petitioner quite clearly misconstrues this Court's decisions in *Florida Star v. B.J.F.*, 109 S. Ct. 2603, and *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). In those decisions, this Court did not restrict its holdings to cases in which the information at issue had been supplied by a "government agency," as petitioner suggests, *see* Petition, at 13; rather, it held that "once the truthful information was 'publicly revealed' or 'in the public domain' [a] court could not constitutionally restrain its dissemina-

Third, the sole basis for the trial court's Order—that petitioner would suffer "irreparable harm" if the Documentary were not enjoined—is directly at odds with the *only* evidence before the court. Dr. Mary Froning, a licensed psychologist who had treated Hilary Foretich on more than 80 occasions, testified both in court and by declaration that, rather than causing her any harm, the telecast would "help[] create an atmosphere of protection for her." App. 43a. Petitioner offered no evidence, documentary or testimonial, to the contrary. Indeed, petitioner offered no evidence at all. Petitioner's court-appointed counsel acknowledged that, prior to seeking injunctive relief, he had not had the opportunity to consult, *inter alia*, with his client, the child's mother, the child's court-appointed guardian in New Zealand (where she currently resides), or with a single expert in such matters (with the exception of Dr. Froning, who pointedly disagreed with his conclusions). *See* App. 25a. Neither parent, no relatives, no experts other than Dr. Froning—in fact, no other witnesses—testified in court or provided testimony by declaration or affidavit in support of petitioner's prayer for injunctive relief. *See* App. 55a-56a.

Petitioner observes that a State's "interest in the 'protection of minor victims of alleged sex crimes from further trauma and embarrassment,' " can be a " 'compelling' one." Petition, at 12 (quoting *Maryland v. Craig*, 58 U.S.L.W. 5044, 5048 (U.S. June 27, 1990)). Even putting aside any State's failure to authorize, by legislative enactment, vindication of that interest through injunctions prohibiting publication or broadcast, petitioner never attempted to make the requisite "showing of necessity" in this case to demonstrate the propriety of the

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tion." 109 S. Ct. at 2610 (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. at 103). In *Smith*, moreover, the Court expressly declined, even in the context of subsequent punishment, to limit its holding to cases in which "government itself provided or made possible press access to the information." 443 U.S. at 103.

relief it sought. *Id.* at 5049; *accord Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608 (1982) (in context of court closure for minor's testimony, "it is clear that the circumstances of the particular case may affect the significance of the interest," so court must weigh "victim's age, psychological maturity and understanding, . . . the desires of the victim, and the interests of parents and relatives").[10]

Not one of the several commentators referenced by petitioner has questioned this Court's consistent placement of the burden of proof upon any litigant that seeks judicial intervention in the field of free expression, whether through prior restraint or subsequent punishment.[11] To the contrary, the commentators—and, more

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[10] At a minimum, any serious effort to suggest that Hilary Foretich would be harmed by telecasts of the Documentary in the United States must come to grips with the undisputed facts that (a) she now resides in New Zealand; (b) her name, her picture, and her own accounts of her abuse have been widely disseminated by both the print and electronic media; (c) she has been the subject of an ongoing dispute between her parents that has led to her mother spending 25 months in prison and to the surreptitious transfer of Hilary from the United States to New Zealand where she lived in hiding for two years; and (d) she and her mother, at the very least, believe she has been repeatedly subject to sexual abuse by her father. In that regard, petitioner's citation to *Morgan v. Foretich*, 528 A.2d 425 (D.C. 1987), is particularly inapposite. Not only does that case address a decidedly different issue—*i.e.*, Dr. Morgan's right to a public hearing—it was rendered in 1987, before Hilary's name and the allegations that she had been abused had become the subject of worldwide attention, before Dr. Morgan's lengthy incarceration, and before Hilary was taken to New Zealand. Even that decision, however, unlike the Order in the instant case, was rendered after the court heard extensive evidence and made specific findings about the circumstances that obtained at that time. *See id.* at 426.

[11] *See, e.g.*, Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 93 (1981) ("[t]he concept of prior restraint is coherent at the core"); Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409, 434 (1983) ("conventional" prior restraint doctrine unnecessary because "superseded by the expanded

importantly, this Court—have uniformly recognized that "temporary" restraining orders, such as the trial court's order in this case, "present a threat to first amendment rights not found in subsequent punishment schemes—the threat that expression will be abridged, if only for a short time, prior to a full and fair hearing before an independent judicial forum to determine the scope of the speaker's constitutional right." Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 55 (1984). *Accord Freedman v. Maryland*, 380 U.S. at 58 ("the burden of proving that the film is unprotected expression must rest on the censor"); *Nebraska Press Association v. Stuart*, 427 U.S. at 559 ("A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted.").

The essential wisdom of this Court's decisions is well illustrated by the instant case. Although there is a substantial body of professional opinion, referenced by Dr. Froning in her testimony, that "victims of child sexual abuse need to be reassured that they have experienced nothing shameful because of what has happened to them," R. App. 2a ¶ 10, the trial court, based solely on its review of less than three minutes of a forty-minute telecast, without the support of any testimony from

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substantive coverage of the First Amendment"); Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 249 (1982) (same). The lion's share of scholarship has, moreover, embraced this Court's prior restraint jurisprudence and the historical tradition upon which it is premised. *See, e.g.*, A. BICKEL, THE MORALITY OF CONSENT 61 (1975); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-34, at 1039-42 (2d ed. 1988); Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 671 (1955); Abrams, *In Defense of Tornillo*, 86 YALE L.J. 361, 367 (1976); Oakes, *The Doctrine of Prior Restraint Since the Pentagon Papers*, 15 MICH. J. OF L. REFORM 497 (1982).

either expert or lay witnesses familiar with the underlying facts, and while acknowledging that it could not and would not attempt to untangle the merits of the underlying dispute between Hilary's parents, concluded that the telecast was "bad stuff" and should be enjoined. App. 13a. It is plain that the trial court's Order was premised on its and its appointed representative's "gut reaction" that the portion of the Documentary they viewed was "offensive," [12] a reaction that the First Amendment precludes them from according the force of law.

Simply put, petitioner made no showing in the trial court that the expression at issue in this case is unprotected by the First Amendment. Under such circumstances, it has been universally recognized that the "special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1973).

II. PETITIONER RAISES A HYPOTHETICAL ISSUE THAT IS NOT RIPE FOR REVIEW IN THIS COURT.

Petitioner's failure to make any showing in support of its request for a temporary restraining order renders its second proposition—that "judicial preservation of an individual's right to privacy may justify a court order barring a television broadcast"—decidedly hypothetical and, at the very least, premature. As petitioner notes, it has now filed an amended complaint in the trial court alleging invasion of privacy and seeking both damages and injunctive relief. Petition, at 13 n.7. Unlike the defendants

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[12] *See, e.g.*, App. 34a (court complained that very act of obscuring the child's face, at the request of her treating psychologist, App. 40a, was "absolutely brutal" and "*particularly* bothersome") (emphasis added).

in *Huskey v. National Broadcasting Co.*, 632 F. Supp. 1282 (N.D. Ill. 1986), respondents have not moved to strike petitioner's prayer for injunctive relief. Accordingly, if petitioner succeeds in carrying its burdens of (1) securing the trial court's consent to pursue this litigation in the name of Hilary Foretich,[13] and (2) prevailing upon its substantive claim that the Documentary constitutes an actionable invasion of privacy, there is nothing in the Court of Appeals order that precludes petitioner from asking the lower courts to determine whether judicial preservation of *this* individual's right to privacy justifies a court order barring further telecasts of *this* expression. At present, however, even if petitioner were correct and this case were "not moot, it surely is not ripe" for review in this Court. *Bowen v. Roy*, 476 U.S. 693, 722 (1986) (Stevens, J., concurring); *accord Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 71-72 (1961) ("No rule of practice of this Court is better settled than 'never to anticipate a question of constitutional law in advance of the necessity of deciding it.' ") (citation omitted).[14]

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[13] In another action alleging invasion of privacy that Dr. Foretich sought to prosecute in Hilary's name, Judge Gerhard Gesell declined to appoint a guardian to assert such claims. *See Foretich v. Glamour*, No. 89-3099 (D.D.C. Apr. 3, 1990).

[14] The same concerns underly the cases cited by petitioner in connection with its suggestion that this matter is not moot. *See, e.g., Lewis v. Continental Bank Corp.*, 110 S. Ct. 1249, 1253 (1990) (Article III courts confined "to resolving 'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon some hypothetical state of facts' ") (citation omitted); *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) ("The Court has never held that a mere physical or theoretical possibility was sufficient. . . ."). Where, as here, the scheduled broadcasts by respondents have all been completed and "contingent future events," including petitioner prevailing on the merits in the trial court, "may not occur at all," *Lewis v. Continental Bank Corp.*, 110 S. Ct. at 1255, there can be no " 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur

The only two cases relied upon by petitioner illustrate the point. In *Huskey*, the trial court, in denying defendant's motion to strike plaintiff's prayer for injunctive relief, emphasized that its "denial of that motion should not be misunderstood as a decision confirming the actual availability of injunctive relief here. This opinion holds only that injunctive relief is not necessarily *im*proper. Only a future evidentiary showing will demonstrate whether or not such relief is appropriate in fact." 632 F. Supp. at 1296 (emphasis in original).[15] And, in *Commonwealth v. Wiseman*, 249 N.E.2d at 612, the Massachusetts court emphasized that injunctive relief was ordered following "2,556 pages of proceedings on eighteen trial days and sixty-four exhibits."[16] Thus, not only does

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involving the same complaining party," *Murphy v. Hunt*, 455 U.S. at 482.

[15] Judge Shadur's opinion in *Huskey*, moreover, expressly acknowledges the need to "tread gingerly in the area of prior restraints," whether "private" or "public" wrongs are alleged. 632 F. Supp. at 1294. In that regard, in *Nebraska Press Association v. Stuart*, this Court reaffirmed that "the barriers to prior restraint remain high," 427 U.S. at 561, even when injunctive relief is sought to vindicate "the most fundamental of all freedoms," an individual's right to a fair trial, *Estes v. Texas*, 381 U.S. 532, 540 (1965); *accord Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971) ("[d]esignating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support" a prior restraint); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 311-12 (1977) (reversing order enjoining news media from publishing name or picture of eleven-year-old boy because it "abridges the freedom of the press").

[16] In addition, the decision in *Wiseman* is premised not on a distinction between "public" and "private" rights, as petitioner contends, *see* Petition, at 11, but on defendant's failure to secure releases from the patients he photographed, despite his agreement to do so as a condition of gaining special access to the hospital from State officials. *See* 249 N.E.2d at 615. Of course, this Court's denial of *certiorari* in *Wiseman*, which preceded the decisions in *Nebraska Press Ass'n*, *Keefe*, and *Oklahoma Publishing*, is in no sense an adjudication of the merits of that case, petitioner's suggestion to the contrary notwithstanding, *see* Petition, at 11. *See Maryland v.*

petitioner fail to identify any judicial decision that conflicts with the Court of Appeals' order here, those decisions it does cite are demonstrably consistent with the Court of Appeals' conclusion.

In the last analysis, petitioner asks this Court to speculate about a host of matters that petitioner has not even begun to satisfy its burden of proving. Based on such speculation, it urges this Court to give its imprimatur to "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Association v. Stuart*, 427 U.S. at 559. The Court of Appeals properly vacated the trial judge's Order precisely because petitioner had not met its burden. Resort to this Court is plainly unwarranted unless and until petitioner prevails on the merits in the ongoing proceedings in the trial court and then presses its claim for injunctive relief.

CONCLUSION

For the foregoing reasons, respondents the British Broadcasting Corp. and Lifetime Cable respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Baltimore Radio Show, Inc., 338 U.S. 912, 919 (1950) (Frankfurter, J.).

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA No. 90-0796-SS

ERIC A. FORETICH, *et al.*,
Plaintiffs,

v.

LIFETIME CABLE, *et al.*,
Defendants.

DECLARATION OF DR. MARY L. FRONING

Pursuant to 28 U.S.C. § 1746, Dr. Mary Froning does hereby depose and state as follows:

1. I have personal knowledge of the facts sworn to in this Declaration.

2. I received my doctorate in psychology from the Illinois School of Professional Psychology.

3. I am currently a co-director of White Oak Psychological Center. My specialty is child psychology and sexual abuse.

4. From August of 1984 to January of 1989, I also was employed as the senior staff psychologist at the Chesapeake Institute in Wheaton, Maryland.

5. During the course of my employment at Chesapeake, I was assigned the case of Hilary Foretich who I began seeing in January of 1986. I saw Hilary continuously on a weekly, and sometimes, by-weekly basis until August 18, 1987. There were 87 separate sessions.

6. In the fall of 1989, I was in contact with Stephen Lambert of the British Broadcasting Corporation concerning the documentary which they were preparing about Hilary Foretich. Mr. Lambert was aware of the existence of videotapes of Hilary Foretich in my possession and asked my permission to use the tapes as part of the documentary which was being prepared.

7. I provided those tapes to Elizabeth Morgan, who transmitted the tapes to Mr. Lambert, with my permission. However, these tapes were provided to Mr. Lambert on the express condition that Hilary's face would be obscured from view.

8. I have reviewed the program "Hilary in Hiding" which I understand is at issue in this litigation.

9. In my professional judgment, the showing of this program would help to create an environment of protection for Hilary and would not otherwise be harmful to her well-being.

10. It is my professional opinion that victims of child sexual abuse need to be reassured that they have experienced nothing shameful because of what has happened to them. I believe that the airing of "Hilary in Hiding" would provide such reassurance to Hilary.

Executed on this 6th day of April, 1990, in the District of Columbia.

/s/ Mary L. Froning, Psy. Dr.
DR. MARY L. FRONING

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA No. 90-0796-SS

ERIC A. FORETICH, *et al.*,
Plaintiffs,

v.

LIFETIME CABLE, *et al.*,
Defendants.

DECLARATION OF PATRICK GUY

Pursuant to 28 U.S.C. § 1746, Patrick W. Guy does hereby depose and state as follows:

1. I have personal knowledge of the facts sworn to in this Declaration.

2. I am a member of the Bar of the State of New York.

3. I am Vice President of Legal and Business Affairs for Hearst/ABC-Viaccm Entertainment Services ("HAVES"), a joint venture that is licensed by the British Broadcasting Corporation (the "BBC") to telecast the documentary "Hilary in Hiding," which is the subject of this litigation. A tape of the documentary is submitted to the Court herewith as Exhibit A to this Declaration. HAVES also operates the Lifetime Television network (the "network"). The network is a 24-hour program service offering news, entertainment and information programming to approximately 47 million households through affiliated cable systems.

4. "Hilary in Hiding" was telecast in its entirety over the network on March 6, 1990. The March 6, 1990

documentary was provided to all affiliated cable systems and, upon information and belief, was transmitted to all of the subscribers of those affiliates.

5. The telecasts of "Hilary in Hiding" scheduled by the network for April 6, 7, 14 and 19, 1990 will be identical to the program that was telecast on March 6, 1990, and which is recorded on Exhibit A.

6. Prior to the March 6, 1990 telecast of the documentary, I had a telephone conversation with Elaine Mittleman, counsel for plaintiff Eric A. Foretich. During that conversation, Ms. Mittleman demanded to know what portions of videotape depicting Hilary Foretich would be telecast on the program. I described to her the contents of the tapes shown in the documentary. Ms. Mittleman objected to the showing of the tapes but conceded that, in light of the constitutional presumption against prior restraints on the news media, she probably would not succeed in preventing broadcast of the tapes. No legal action of any kind was brought to prevent the March 6, 1990 telecast of the documentary.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day of April, 1990, in Astoria, New York.

/s/ Patrick W. Guy
PATRICK W. GUY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA No. 90-0796-SS

ERIC A. FORETICH, *et al.*,
Plaintiffs,

v.

LIFETIME CABLE, *et al.*,
Defendants.

DECLARATION OF STEPHEN LAMBERT

Pursuant to 28 U.S.C. § 1746, Stephen Lambert does hereby depose and state as follows:

1. I have personal knowledge of the facts sworn to in this Declaration.

2. I produced the program entitled "Hilary in Hiding."

3. The program "Hilary in Hiding" includes a videotape of Hilary, which was filmed in the office of Mary Froning, a child abuse expert (the "videotape"). In the videotape, Hilary, through words and the use of anatomically correct dolls, explains and illustrates the sexual acts which her father allegedly performed on her and Heather, her step-sister.

4. The videotape was given to me by Dr. Elizabeth Morgan, Hilary's mother.

5. The videotape was filmed by Dr. Mary Froning; Dr. Froning was Hilary's therapist between February of 1986 and August of 1987.

6. Both Dr. Morgan and Dr. Froning were contacted regarding the advisability of including the videotape in

"Hilary in Hiding." Dr. Morgan and Dr. Froning both consented to the inclusion of the videotape in "Hilary in Hiding."

7. In order to protect the privacy interests of Hilary, we used recording techniques that obscured Hilary's face. Therefore, at no time was Hilary readily identifiable.

8. Prior to the first broadcast of "Hilary in Hiding" in the United States, Eric Foretich was given an opportunity to preview the program. On February 13, 1990, Eric Foretich visited our London office and viewed the program, including the videotape. Until the filing of this lawsuit, Foretich did not indicate that he had objections to the program or the inclusion of the videotape as part of the program on the grounds which he currently asserts in the Complaint and supporting documents.

9. Throughout the dispute regarding the alleged sexual abuse of Hilary, Foretich has maintained that Hilary personally has not asserted charges of sexual abuse against her father and that she was "coached" by her mother, Dr. Morgan. As a matter of fact, the question of whether Hilary was coached by Dr. Morgan is a central issue of the controversy. The videotape provides evidence which is highly relevant to the question of whether Hilary was coached by Dr. Morgan.

Executed on this 6th day of April, 1990, in London, England.

/s/ Stephen Lambert
STEPHEN LAMBERT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA No. 90-0796-SS

ERIC A. FORETICH, *et al.*,
Plaintiffs,

v.

LIFETIME CABLE, *et al.*,
Defendants.

DECLARATION OF LEE LEVINE

Pursuant to 28 U.S.C. § 1746, Lee Levine does hereby depose and state, upon information and belief, as follows:

1. I have personal knowledge of the facts attested to in this Declaration.

2. I am a member of the Bar of this Court and of the District of Columbia Court of Appeals.

3. On January 20, 1990, the program "Saturday Night With Connie Chung," which is broadcast on the CBS television network, contained a segment entitled "Morgan v. Foretich." A videotape of this segment is submitted to the Court herewith as Exhibit A to this Declaration.

4. Depictions of Hilary Foretich substantially similar to those contained in the documentary "Hilary in Hiding" (the "documentary"), which is the subject of this litigation, were broadcast throughout the United States on January 20, 1990, on "Saturday Night With Connie Chung," during the segment entitled "Morgan v. Foretich."

5. In addition, countless newspaper articles, published in both national and Washington, D.C. area publications,

have reported on the subjects and events examined in the documentary.

6. Depictions of Hilary Foretich substantially similar to those included in the documentary have previously been broadcast or telecast by international, national and local broadcast and cable media.

7. Countless newspaper and magazine articles have published allegations and facts regarding the alleged sexual abuse of Hilary Foretich by Eric Foretich. Many of these articles have reported and discussed Hilary's own statements regarding the nature of the sexual abuse she claims her father perpetrated upon her. Many of these statements are substantially similar to those contained in the documentary at issue. *See, e.g.*, Exhibit B hereto.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day of April, 1990, in Washington, D.C.

/s/ Lee Levine
LEE LEVINE